

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ONEWEST BANK, FSB,	) CIVIL NO. 12-00108 ACK-KSC
)
Plaintiff,	) FINDINGS AND
	) RECOMMENDATION TO GRANT
vs.	) PLAINTIFF'S MOTION FOR AN
	) ORDER FOR DEFENDANT
J RANDALL FARRAR;	) CHRISTOPHER SALEM TO SHOW
CHRISTOPHER SALEM; WAYNE	) CAUSE WHY HE SHOULD NOT BE
WAGNER; MARY WAGNER; LOT	) HELD IN CIVIL CONTEMPT FOR
48A LLC; POOL PRO, INC.;	) VIOLATING THE COURT'S
CREDIT ASSOCIATES OF MAUI,	) ORDER, AND FOR AN ORDER TO
LTD.; JOHN AND MARY DOES 1-	) ENFORCE JUDGMENT FOR
20; DOE PARTNERSHIPS 1-20;	) SPECIFIC ACTION
DOE CORPORATIONS 1-20;)
OTHER ENTITIES 1-20,)
)
Defendants.)
_____)

FINDINGS AND RECOMMENDATION TO GRANT PLAINTIFF'S
MOTION FOR AN ORDER FOR DEFENDANT CHRISTOPHER SALEM
TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CIVIL
CONTEMPT FOR VIOLATING THE COURT'S ORDER, AND FOR
AN ORDER TO ENFORCE JUDGMENT FOR SPECIFIC ACTION

Before the Court is Plaintiff OneWest Bank's
("Plaintiff") Motion For an Order For Defendant
Christopher Salem to Show Cause Why He Should Not Be
Held in Contempt For Violating The Court's Order, and
For an Order to Enforce Judgment For Specific Action
("Motion"), filed December 5, 2013. Defendant
Christopher Salem ("Defendant Salem") filed an

Opposition on December 23, 2013. On December 27, 2013, Plaintiff filed a Reply.

Defendant Salem filed an Errata on January 2, 2014, which contained additional exhibits and Defendant Salem's declaration. In response, Plaintiff filed a Supplemental Reply, asking that the Errata be stricken because it was untimely filed.¹

This matter came on for hearing on January 6, 2014. Craig Shikuma, Esq., appeared on behalf of Plaintiff; David Cain, Esq., appeared by phone on behalf of Defendant Salem, along with Defendant Salem; and Kurt Leong, Esq., appeared on behalf of Defendant J. Randall Farrar. After careful consideration of the Motion, the supporting and opposing memoranda, and the arguments and comments of counsel and Defendant Salem, the Court HEREBY FINDS AND RECOMMENDS that the Motion

¹ The filing of the Errata appears to be an attempt to circumvent the Opposition deadline, and it was an improper method of expanding the record two business days before the hearing without leave of Court. Nevertheless, the Court declines to strike the Errata from the record. Defendant Salem's declaration and the additional exhibits have been considered and have no material affect on the Court's recommendation.

be GRANTED for the reasons set forth below.

BACKGROUND

As the Court and the parties are familiar with the extensive history of this case, the Court includes only those facts necessary for the disposition of the instant Motion.

On August 26, 2013, the parties placed a settlement on the record and the Court set a status conference regarding the completion of the settlement agreement for September 11, 2013. At the status conference, the parties informed the Court that they were circulating and reviewing the draft settlement agreement.

The Court held another status conference on September 19, 2013, at which the parties advised that the settlement documents had been circulated, but that Defendant Salem needed additional time. The Court set a deadline of September 23, 2013, for Mr. Cain to submit the documents.

On October 1, 2013, Plaintiff filed a Motion to

Enforce Settlement Agreement. At the October 15, 2013 hearing on the Motion to Enforce, the Court recommended that the Motion to Enforce be granted and that Plaintiff be awarded reasonable fees incurred in connection with the motion. On October 31, 2013, this Court issued counsel-prepared Findings and Recommendation ("F&R") with respect to the Motion to Enforce, recommending the following:

1. Salem shall execute and deliver the Final Settlement Agreement (Exhibit R to the Motion to Enforce) within three business days of the District Court's adoption of these recommendations and entry of the order;
2. Salem shall execute and deliver exhibits 1, 2, 3, 4, 6, and 8 (which are attached to Exhibit R) within three business days of the District Court's adoption of these recommendations and entry of the order;
3. Salem shall show proof of funds and proof that such funds are not from the Bankruptcy Estate within three business days of the District Court's adoption of these recommendations and entry of the order;
4. Salem shall pay to Wagner \$50,000.00 for their release of lien on the Hui Road property;
5. Salem shall pay to Plaintiff \$575,000 for the Lower Road Property;
6. Salem shall pay Plaintiff's reasonable attorneys' fees and costs incurred in bringing its

Motion to Enforce. Plaintiff shall submit proof of its fees and costs pursuant to LR 54.3; and

7. The Court will retain jurisdiction to ensure Salem's compliance with the District Court's adoption of these recommendations and entry of order.

F&R at 25-26.

On November 18, 2013, this Court issued a Findings and Recommendation Regarding Attorneys' Fees ("Fee F&R"), recommending that 1) Plaintiff be awarded \$16,680.10 in attorneys' fees and 2) that Defendant Salem be ordered to remit payment within 2 weeks after the entry of the order taking action on the Fee F&R. Fee F&R at 9-10.

On November 19, 2013, the district court issued an Order Adopting Magistrate Judge's Findings and Recommendation ("11/19/13 Order"). Defendant Salem has appealed the 11/19/13 Order to the Ninth Circuit.

The district court adopted the Fee F&R on December 10, 2013.

Presently at issue is whether Defendant Salem

violated the 11/19/13 Order. At the hearing, the Court held its ruling in abeyance to allow additional time for compliance because Defendant Salem himself represented that he would sign a deed in lieu to comply with the 11/19/13 Order and sign off on money held by the receiver that same day. The Court expressed its inclination to recommend that the Motion be granted and that coercive and compensatory sanctions issue. The Court directed Mr. Shikuma to advise the Court by 4:30 p.m. on January 9, 2014, about whether Defendant Salem complied with the 11/19/13 Order and/or whether Defendant Salem's actions have mooted this Motion. Plaintiff's counsel timely notified the Court that Plaintiff had not received executed settlement documents or payment from Defendant Salem in connection with the 11/19/13 Order.

DISCUSSION

Plaintiff requests that Defendant Salem be held in civil contempt for violating the 11/19/13 Order. Plaintiff submits that it has proved by clear and

convincing evidence that Defendant Salem violated said Order.

In challenging this Motion, Defendant Salem reargues the merits of this action and accuses Plaintiff's counsel of misconduct. He justifies his failure to execute the settlement by alleging that Plaintiff's employees interrupted the process by directly contacting him and that newly obtained discovery proves that La Jolla Bank mortgage were unlawfully executed in violation of federal lending laws.² Defendant Salem believes that he has taken all steps to comply with the 11/19/13 Order and that he has acted in good faith.

Civil contempt occurs when a party disobeys a specific and definite court order by failing to take all reasonable steps within the party's power to

² In his Opposition, Defendant Salem requested that the Court reopen discovery. This request is denied. The case has settled, it is on appeal, and Defendant Salem has been ordered to comply with the settlement terms. All that remains for disposition is whether he should be held in contempt for failing to comply with the 11/19/13 Order.

comply. In re Dual-Deck Video Cassette Recorder Antitrust, 10 F.3d 693, 695 (9th Cir. 1993). District courts have "wide latitude in determining whether there has been contemptuous defiance of its order." Hook v. Ariz. Dep't of Corrections, 107 F.3d 1397, 1403 (9th Cir. 1997). Contempt "'need not be willful,' and there is no good faith exception to the requirement of obedience to a court order." In re Dual-Deck, 10 F.3d at 695 (quoting In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987)). The party moving for a finding of civil contempt must demonstrate by clear and convincing evidence that the alleged contemnor violated the court's order, and "a person should not be held in contempt if his action 'appears to be based on a good faith and reasonable interpretation of the [court's order].'" Id. (alteration in original) (quotations and citations omitted); Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982).

A. Defenses

"`Substantial compliance" with the court order is a defense to civil contempt, and is not vitiated by 'a few technical violations' where every reasonable effort has been made to comply." In re Dual Deck, 10 F.3d at 695 (citations omitted); Gen. Signal Corp v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986) (citing Vertex, 689 F.2d at 891-92) (If a defendant has taken "all reasonable steps" to comply with the court order, technical or inadvertent violations of the order will not support a finding of civil contempt).

"Ability to comply is the crucial inquiry, and 'a court should weigh all the evidence properly before it determines whether or not there is actually a present ability to obey.'" United States v. Ayers, 166 F.3d 991, 994 (9th Cir. 1999) (quoting United States v. Drollinger, 80 F.3d 389, 393 (9th Cir. 1996)).

Respondents may not use a contempt proceeding as a basis for reconsidering the legal or factual basis of the order alleged to have been disobeyed. Ayers, 166 F.3d at 955 (quoting United States v. Rylander,

460 U.S. 752, 756-57 (1983) (citation omitted)).

However, in a civil contempt proceeding, "a defendant may assert a present inability to comply with the [enforcement] order in question." Id. (citations omitted). Where a defendant raises the present inability defense, he or she has the burden of production. Id. (citations omitted). In the event compliance with the order is factually impossible, there is no reason to proceed with the civil contempt action. Id.

In the present case, Plaintiff has established, by clear and convincing evidence, that Defendant Salem violated the 11/19/13 Order. Although Defendant Salem argues that he has acted in good faith, it is undisputed that all of the conditions set out in the F&R, and adopted in the 11/19/13 Order, have not been satisfied. It is therefore Defendant Salem's burden to demonstrate a present inability to comply. He has failed to do so. Defendant Salem has not offered a legitimate basis for failing to comply, nor established

that he substantially complied with the Order. None of the arguments and excuses advanced by Defendant Salem bear on this Motion. Discovery regarding La Jolla Bank is irrelevant and cannot serve as a basis for failing to execute the settlement agreement by the prescribed deadline. Neither is Plaintiff's counsel's allegedly improper conduct a defense to civil contempt. This proceeding may not be used to reargue the merits of the case or to seek reconsideration of the 11/19/13 Order.

The facts and history are clear: the parties entered into a settlement on the record, the settlement was enforced, and the Court imposed compliance deadlines which Defendant Salem has disregarded. Defendant Salem has failed to fulfill his obligations under the settlement and he continues to cause delay with his obstructionist tactics, which is precluding final resolution of this case.

B. Sanctions

Plaintiff seeks both coercive and compensatory sanctions. The court employs civil contempt sanctions

"for two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir. 1992) (citing United States v. United Mine Workers of Am., 330 U.S. 258, 303-04 (1947)). If a sanction is imposed for the purpose of coercing the contemnor, "the court must, in determining the size and duration of the sanction, 'consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.'" Id. (quoting United Mine Workers, 330 U.S. at 304).

A court may award fines as a compensatory sanction, but such "awards are limited to 'actual losses sustained as a result of the contumacy.'" Gen. Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1380 (9th Cir. 1986) (citation omitted); see also United Mine Workers, 330 U.S. at 304 (stating that a compensatory fine must "be based upon evidence of

complainant's actual loss"). Courts also have the power to order imprisonment. Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1250 (9th Cir. 2006). "A close analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure." Id. (quoting Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 829 (1994)) (quotations omitted).

The Court finds that the imposition of coercive and compensatory sanctions are necessary and appropriate. This action settled over four months ago, and Defendant Salem has been on notice of this Court's recommended conditions since October 15, 2013. Thus, he had sufficient time to comply with the 11/19/13 Order, yet he has allowed nearly two additional months to pass without complying. Notwithstanding his verbal representation to the Court at the hearing that he

would comply that day, he has failed to do so.³ The Court will not tolerate any further delays by Defendant Salem. Accordingly, as a coercive sanction, the Court recommends that the district court impose a \$200 fine, due per calendar day, until Defendant Salem fully complies with the conditions set out in F&R, as adopted by the 11/19/13 Order.

The Court also finds that compensatory sanctions should be imposed against Defendant Salem. Plaintiff has been forced to incur additional fees and seek Court intervention due to Defendant Salem's refusal to comply with the 11/19/13 Order. The Court recommends that Plaintiff be awarded its reasonable fees and costs incurred in connection with this Motion. As before, Plaintiff's counsel shall submit a declaration in conformance with Local Rule 54.3(d) to support Plaintiff's request for fees and costs.

³ The Court questions Mr. Cain's decision to ask that Defendant Salem be permitted to speak, when Defendant Salem clearly misrepresented his intentions. Defendant Salem will not be permitted to speak at future hearings unless he is proceeding pro se, as his conduct has established that he is not credible.

Following the submission of the declaration, the Court will issue a supplemental findings and recommendation regarding the amount of fees and costs to be awarded to Plaintiff.

Plaintiff finally requests that the Court direct the Clerk to execute the documents for Defendant should he fail to do so. The Court declines to make such a recommendation at this time. However, the Court cautions Defendant Salem that his continued disobedience will result in the imposition of additional sanctions.

CONCLUSION

In accordance with the foregoing, the Court HEREBY FINDS AND RECOMMENDS that Plaintiff's Motion For an Order For Defendant Christopher Salem to Show Cause Why He Should Not Be Held in Contempt For Violating The Court's Order, and For an Order to Enforce Judgment For Specific Action, filed December 5, 2013, be GRANTED.

IT IS SO FOUND AND RECOMMENDED.

DATED: Honolulu, Hawaii, January 10, 2014.




Kevin S.C. Chang
United States Magistrate Judge

CV 12-00108 ACK-KSC OneWest v. Farrar, et al.; FINDINGS AND RECOMMENDATION TO GRANT PLAINTIFF'S MOTION FOR AN ORDER FOR DEFENDANT CHRISTOPHER SALEM TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE COURT'S ORDER, AND FOR AN ORDER TO ENFORCE JUDGMENT FOR SPECIFIC ACTION